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STATEMENT OF
THE U. S. CONFERENCE OF MAYORS,
THE NATIONAL LEAGUE OF CITIES,
THE NATIONAL ASSOCIATION OF COUNTIES,
AND THE NATIONAL ASSOCIATION
OF TELECOMMUNICATIONS OFFICERS AND ADVISORS

TO THE U. S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON TELECOMMUNICATIONS AND FINANCE

CONCERNING

H.R. 1303
THE "CABLE TELEVISION CONSUMER PROTECTION
AND COMPETITION ACT OF 1991"

March 20, 1991

Mr. Chairman and Members of the Subcommittee, the U.S. Conference of Mayors ("Conference"), the National League of Cities ("League"), the National Association of Counties ("NACO"), and the National Association of Telecommunications Officers and Advisors thank you for the opportunity to submit this statement as part of the hearing record on H.R. 1303, the "Cable Television Consumer Protection and Competition Act of 1991."

This Statement supplements the Testimony provided by the Honorable Sharpe James, Mayor of the City of Newark, the Honorable Kurt L. Schmoke, Mayor of the City of Baltimore, the Honorable Xavier L. Suarez, Mayor of the City of Miami and the Honorable Lane Siftar, title to come, who testified on behalf of the League, Conference and NACO before this Subcommittee.

Outlined below are comments concerning the provisions of H.R. 1303. This Statement also addresses three questions posed by members of the Subcommittee that called for responses for the record. Rep. Matthew J. Rinaldo (R-N.J.) asked why cities believe they currently do not have sufficient authority to address customer service issues. Rep. Michael G. Oxley (R-Ohio) asked for information concerning how cities spend revenue collected as franchise fees from cable operators. Finally, Rep. Michael Bilirakis (R-Florida) asked what changes to the Cable Act, short of reregulation, would satisfy cities.

I. COMMENTS ON THE BILL

A. Section 2: Findings

First, local governments recommend a slight change in emphasis in Section 2(b)(2). It notes that "a minority of cable operators" have abused their deregulated status and resultant market power by instituting unreasonable rate increases. Indeed, this is true, but the use of "minority" tends to underestimate the problem. A June 1990 study by the General Accounting Office has demonstrated that the absence of rate regulation has allowed many cable operators to use their monopoly power unfairly in charging consumers. The study reveals that cable operators increased rates, in the three years following deregulation in December 1986, by an average of 39 percent for the most popular basic services, and 43 percent for the lowest priced basic services. See General Accounting Office, Follow-Up National Survey of Cable Television Rates and Services (June, 1990).

Second, Section 2(b)(3) indicates that Congress should develop a means for the FCC to identify cable operators that impose unreasonable or abusive rates and provide a way for the FCC to prevent such behavior. Local governments suggest that this language be changed to contemplate a key role in this rate protection process for cable franchising authorities.

Third, Section 2(b)(15) notes that Congress aims to encourage access to video programming for competing multichannel video system operators. However, the section notes that exclusive programming contracts that "do not have the effect of significantly impeding competition" would remain acceptable. Local governments suggest that this exception be deleted because of the apparent adverse effects on competition spawned by exclusive programming contracts.

B. Section 3: Requirements For the Provision and Regulation of Basic Service Tier

The rate provisions in H.R. 1303 take some positive steps in alleviating concerns local governments have about these issues. However, several revisions and clarifications are required in Section 3 to ensure adequate protection for consumers.

First, in addition to the installation and leasing of equipment necessary to receive the basic

service tier, proposed Section 623(b)(1)(B) of the Cable Act should be amended to subject the sale of cable equipment to rate regulation. Otherwise, cable operators could undermine the intent of regulating the rental of cable equipment by selling such equipment at monopolistic prices. Local governments also suggest deleting the word "necessary" from this section and replacing it with the word "used." Consumers should be protected from abusive rates charged for all cable equipment, not just equipment that is the minimum necessary to receive basic services.

Second, proposed Section 623(b)(1)(E)(i) would merely allow franchising authorities to "oversee" rate regulation conducted by the FCC. This provision should be revised so that franchising authorities play the significant role in regulating rates. As noted in other sections of this analysis, the basic cable service tier that local governments may regulate should be expanded and the FCC should be limited to establishing a general federal rate regulatory framework and reviewing appeals by cable operators of local rate decisions. Provisions in Sections 623(b)(1)(E) and 623(c)(1) also should make clear that franchising authorities may have the right to ensure that basic rates are "reasonable," and not simply "unreasonable or abusive."

Third, proposed Section 623(b)(2), which defines the basic cable service tier subject to local regulation, should be amended to contemplate a more meaningful composition of the basic service tier. As currently defined, it would include only broadcast stations, PEG access channels and C-Span. The bill should broaden the definition of the basic service tier that local governments may regulate to include all programming, except non-advertiser supported programming offered on a per channel or per program basis. At a minimum, the bill should be amended to require that if fewer than 30 percent of all customers to a cable system subscribe only to basic cable service, franchising authorities and the FCC shall ensure that the rates are reasonable for the most popular tier of service. These amendments are necessary to ensure that a majority, rather than a minority, of cable subscribers pay reasonable rates for the tier of cable service that they receive.

Fourth, proposed Sections 623(b)(4)(A) and 623(b)(4)(B), which prohibit a cable operator from adding video programming to the basic service tier, other than nationally-distributed public and

governmental affairs cable networks that are tax-exempt, should be deleted. Such a programming limitation, on an already narrowed tier of service, is not in the best interests of cable subscribers.

Fifth, proposed Section 623(c)(2), which delineates the factors the FCC shall consider in setting criteria for determining when rates are unreasonable or abusive, should be amended to include a provision requiring the FCC to consider local factors. A rate increase might be considered reasonable and not abusive from the standpoint of the few factors now listed in Section 623(c)(2)(A)-(E), but wholly unreasonable in light of local conditions surrounding such an increase.

Sixth, proposed Sections 623(b)(1) and 623(c)(1) should be amended to require the FCC to update periodically its rate standards. Otherwise the FCC may fail to update its rate standards to reflect contemporary conditions. Such a concern is valid because the FCC has failed to update its 20-year old technical standards, despite significant developments in cable technology.

Seventh, the proposed Section 623(d)(2) should be amended to include all persons with disabilities, not just the hearing-impaired. Franchising authorities also should be able to regulate the equipment which facilitates the receipt of cable service by, among others, the blind and the ambulatory-impaired.

C. Section 4: Carriage of Noncommercial Television Stations

Proposed Section 614(d) would allow cable operators, with franchising authority approval, to meet carriage obligations for noncommercial television stations by placing them on unused PEG channels. Although local governments are pleased that franchising authorities must approve such decisions, they believe this section should also include a time limit on the period a noncommercial station can be carried on an unused PEG channel. A cable operator should be required to remove the noncommercial station from the PEG channel to another channel after that time period expires.

D. Section 6: Consumer Protection and Customer Service

Local governments are not opposed to the FCC establishing baseline customer service standards, as

contemplated by H.R. 1303. However, local governments recommend changes in the bill to clarify and enhance the role of franchising authorities in protecting consumers.

First, proposed Section 632(a) should be amended to allow franchising authorities to establish unilaterally by ordinance or local law, and enforce, customer service standards that exceed those set by the FCC.

Second, proposed Section 632(d)(2) would allow a franchising authority and a cable operator to agree to customer service requirements that exceed those set by the FCC. This section would be unnecessary if, in other clauses of the section, it is made clear that franchising authorities may establish unilaterally and enforce customer service requirements more stringent than those set by the FCC.

E. Section 7: Technical Standards

Local governments are pleased that H.R. 1303 addresses the severely outdated technical standards currently in force at the FCC. It is encouraging that the bill will require the FCC to modernize its standards, and to periodically update them as the need arises. However, because current problems in this area have resulted from 20 years of inaction by the FCC, several amendments are necessary.

First, the section should be amended so that local franchising authorities have the right to impose, by ordinance or franchise agreement, signal quality standards more stringent than those set by the FCC. This authority is important because peculiar local conditions often will prevent national standards from assuring that cable subscribers receive the signal quality that they expect and deserve.

Second, proposed Section 624(e) should be amended to require cable operators to comply with the FCC's newly adopted technical standards within one year.

F. Section 8: Competition And Technological Development

Local governments are encouraged by many of the competitive provisions in Section 8 that would help prevent discrimination by cable programmers against unaffiliated cable systems and other alternative multichannel video programmers, and by cable operators

against unaffiliated programmers. However, local governments also suggest several changes in the section that would further promote a competitive marketplace.

First, franchising authorities are opposed to any provisions that would allow cable operators to continue entering into exclusive programming contracts. Multichannel video programming distributors that attempt to compete with cable operators often allege that these exclusive contracts are used to prevent them from obtaining the popular programming necessary to compete. Therefore, proposed section 705A(a)(2) should be amended to delete language that would continue to sanction these exclusive programming contracts as long as they do not "have the effect of significantly impeding competition." Local governments believe this loophole would lead to continuing efforts by cable operators to frustrate a competitive environment.

Second, local governments recommend the deletion of Section 8(b)(1)(B) in H.R. 1303, which prohibits a cable operator from "coercing" a video programmer into providing exclusive rights as a condition of carriage on the system. This section leaves open the inference that merely agreeing to these arrangements without duress would be acceptable.

Third, proposed Section 705A(f), which grandfathers exclusive programming contracts entered into before June 1, 1990, should be deleted. Such a provision would allow existing exclusive contracts to be renewed and perpetuate indefinitely the problems other provisions in this section attempt to solve.

G. Section 13: Sales of Cable Systems

Local governments are encouraged that H.R. 1303 proposes anti-trafficking restrictions, which direct attention to frequent cable system transfers that ultimately are paid for by consumers. However, local governments suggest a change in the proposed Section 616.

Local governments believe that proposed Section 616(e) should be deleted. This section proposes that franchising authorities have only 120 days to act on any request for approval of a sale or transfer of a cable system. A franchising authority should not be forced to act if it has not been able to determine whether a franchise transfer is in the public interest. Franchise compliance review proceedings are time-consuming, and

local governments often find that cable operators do not make available the information necessary to make these decisions.

H. Section 14: Cable Channels for Commercial Use

Local governments support those provisions in H.R. 1303 that call for the FCC to ensure that the terms of leased commercial access under Section 612 of the Cable Act are fair and reasonable. In addition to these changes, however, H.R. 1303 should delete existing Section 612(h) of the Cable Act. Local governments believe it may present serious constitutional questions for a franchising authority -- on its own, absent a court proceeding -- to prohibit the carriage of leased access programming it deems obscene or indecent. The proper method for a local government to attempt to remove such programming would be to seek appropriate relief from a court.

I. Franchise Renewal

H.R. 1303 does not contain a renewal provision. Therefore, the bill should be amended to include several changes to Section 626 of the Cable Act that would promote competition and spur improvements in the cable service that subscribers receive. The most important of these changes include the following:

First, Section 626(a) should be amended by adding language at the end of that subsection which clarifies that cable operators must submit a timely written notice to invoke the formal renewal proceedings of the Act.

Second, local governments suggest that an additional factor be added to the list of elements in subsection (c)(1) considered by a franchising authority at renewal proceedings. Language should be added to permit franchising authorities to consider any other factors reasonably found by the franchising authority to be relevant to the public interest in cable service.

Third, subsections (c)(1)(A)-(B) should be amended to allow franchising authorities to consider, for the purpose of determining whether to grant renewal, compliance with franchise obligations by predecessors to the current system operator.

Fourth, the "cure" provisions of Section 626(d) should be amended. Language should be added to this

section to assure that cable operators will not escape responsibility for long years of poor service, despite notice that their service is inadequate, by curing the causes of poor service immediately prior to renewal.

Fifth, the judicial review provisions of Section 626(e) should be amended. The standard of review of franchising authority renewal decisions in subsection (e)(2)(B) should be changed to "arbitrary and capricious," which is in line with the standard applied to many other governmental decisions.

Sixth, a new subsection should be added that clearly authorizes municipalities to solicit competing bids for a franchise subject to renewal. If cable operators knew they would face such real competition at renewal, they would have more incentive to upgrade their performance during the life of a franchise. A franchising authority should be able to determine that a competing operator will better serve a community's cable television needs and to award the franchise to that cable operator.

J. Limitations on Franchising Authority Liability

H.R. 1303 does not contain a provision to protect franchising authorities from the damages they may suffer from the ever-increasing challenges to their authority to regulate cable system operators. The bill should be amended to include such a provision.

The bill should grant franchising authorities immunity in any federal, state or local claim challenging their right to regulate a cable operator, except for claims where an individual proves discrimination on the basis of race, color, sex, age, religion, national origin or handicap. A cable operator, however, should be entitled to injunctive and declaratory relief.

II. QUESTIONS FOR THE RECORD

A. Response to Rep. Rinaldo

Rep. Rinaldo asked during the hearing why local governments, in light of Section 632 in the Cable Act, believe they do not possess sufficient authority to address customer service issues. Section 632 of the

Act, codified at 47 U.S.C. § 552, permits franchising authorities to include customer service requirements in franchise agreements and provides the power to enforce such provisions.

Indeed, local governments do believe that the authority granted under Section 632 of the Act is an important tool with which to protect consumers. A particularly vivid example of the value of local control in customer service situations occurred in the City of Miami. As the Honorable Mayor Xavier L. Suarez noted in his written testimony before the Subcommittee, by 1987 the City of Miami was faced with intolerable levels of consumer dissatisfaction with service provided by the local cable operator. In that year alone, the City catalogued more than 3,700 complaints relating to customer service issues. The City Commission then passed a resolution setting service standards for, among other things, telephone service response, installation and repair appointments, and reporting requirements to enable the City to monitor compliance.

Miami cable officials report this effort at local consumer protection to be a success. In 1988 alone, the City received 50 percent fewer complaints. On almost every occasion when the City has moved to enforce service standards, the local cable system has moved to comply.

Therefore, local governments agree with Rep. Rinaldo that the current scheme, providing for franchising authorities to govern customer service issues, is an appropriate course. That is exactly why local governments have expressed concern over the customer service provisions in H.R. 1303. The bill directs the FCC to "establish standards by which cable operators may fulfill their customer service requirements." H.R. 1303 also would allow franchising authorities and cable operators to negotiate standards that exceed those set by the FCC. These measures would scale back the authority local governments already are granted under Section 632 of the Cable Act.

While local governments do not oppose baseline customer service standards established by the FCC, they should be allowed by local law or ordinance to impose more stringent requirements. Without the kind of local control of customer service issues intended by Section 632 of the Act, cities would be handicapped in their efforts to protect consumers from indifferent service by cable operators. As the City of Miami has demonstrated,

local governments are closest to these consumer complaints and best equipped to address them adequately.

Local governments believe that H.R. 550, introduced this session by Rep. Christopher Shays (R-Conn.), adopts the best approach to customer service issues. It allows franchising authorities to establish more stringent standards than those set by the FCC, regardless of whether by ordinance or by franchise agreement.

However, in many communities the ability of a franchising authority to set customer service standards is insufficient because cable operators often have no incentive to comply. Without the ability to regulate rates, and scant authority to deny renewal, local governments frequently are left with standards that look good on paper yet fail to protect consumers because cable operators know noncompliance has few costs. Therefore, a local government's ability to set customer service standards cannot be considered apart from its authority over rate increases and its ability to deny renewal to cable operators that don't provide appropriate service to consumers.

B. Response to Rep. Oxley

Rep. Oxley asked the League and Conference to submit further information about how franchise fees are used by local jurisdictions.

Section 542 of the Cable Act, codified at 47 U.S.C. § 541, sets forth the terms under which cable operators may be charged a franchise fee. Section 542 limits such franchise fees to 5 percent of a cable operator's gross revenues in a twelve-month period. Local governments wish to be clear that franchise fees are not accessed as any sort of penalty on cable operators, but as just compensation for the use of valuable public rights-of-way and other public property. Such fees also are in force for other uses of public rights-of-way, such as utilities. In fact, because these fees are compensation for the use of public property, they are usually deposited into a city's general revenues and allocated pursuant to the normal budget process.

It is often the case, as in Baltimore, that a large portion of franchise fee monies is dedicated to providing public and educational programming to local

communities. This often entails providing coverage of local governmental meetings of interest to the community's residents.

Both Baltimore and Miami note that franchise fee revenues are also used to support their community's cable administration offices, whose staff members act to protect consumers and monitor the many complaints received about service provided by the local cable operator. Miami also uses part of its franchise fee monies for the maintenance and operation of the institutional network which carries the City's data communications, for public information efforts and for various other public safety and educational services.

The local cable operator in Miami operates under the auspices of two local entities: the City of Miami and the Metro-Dade County government. To abide by the 5 percent Cable Act limitation, 4 percent of the franchise fee is collected by the City and 1 percent by Dade County. New Jersey law permits the City of Newark to charge a franchise fee of 3 percent, which must be placed in the City's general fund. The City is seeking a change in that restriction which would allow it to dedicate these funds to its cable administration office.

C. Response to Rep. Bilirakis

Rep. Bilirakis asked the League and Conference to answer this question: What legislative relief, besides reregulation, would satisfy the cities?

Local governments have noted on many occasions, including earlier in this document, why it is important that local officials have rate regulatory authority over cable operators. It is important to note that local governments do not, in any way, seek this authority to raise revenue or exact retribution on the owners of cable systems. In fact, local officials need this authority to protect consumers from the abusive practices of a monopolistic cable industry. The industry's position that local governments seek rate regulatory authority merely to enhance its power is far from the truth. It is exactly because of the activities of the cable industry that local governments need rate regulatory authority to protect consumers.

However, within the spirit of Rep. Bilirakis' question, there are several key legislative provisions short of reregulation that cities believe are essential

to enhance their efforts to see that consumers receive quality cable service at an affordable price.

Local governments continue to believe that a competitive environment in the cable industry would give cable operators the incentive to provide better service at more reasonable rates to consumers. However, because industry practices are so deeply entrenched, it is obvious that competition cannot emerge overnight. Some of the major steps Congress could take in this area are as follows:

• Competitive renewals: Congress should add a competitive renewal provision to the Cable Act, which would allow other cable operators to compete for a franchise subject to renewal. Currently, the presumptions in favor of renewal in the Act are so overwhelming that they grant a virtual perpetual franchise to a cable operator. If cable operators knew they would face real competition at renewal, they would have more incentive to upgrade their performance during the life of a franchise. H.R. 500 contains a competitive renewal provision that local governments support.

• Conditions on telco entry: Though H.R. 1303 does not contain provisions allowing telephone companies ("telcos") to provide cable television service, this issue is of great concern to local governments. While cities believe that telco entry could enhance competition in the cable industry, they believe it should be approached cautiously, and not in isolation. Telco entry alone, without some form of interim local rate regulation, would not be in the best interests of cable consumers. In addition, telco entry should only occur with several important conditions and safeguards in place.

First, any telco legislation should ensure that telcos cannot use revenues from their telephone service customers to subsidize their provision of cable service.

Second, telcos should be required to obtain a cable franchise from the cable franchising authority. Telcos that provide cable service separate from their telephone service should be subject to the same franchising requirements to which cable operators are subject.

Third, telcos that provide cable service integrated into their telephone service -- or that

provide "video dial tone" service, such that the cable operator does not provide programming but leases channel capacity to programmers -- should be subject to appropriate franchising requirements.

Fourth, telcos should be barred from acquiring existing cable systems unless the franchising authority believes that exceptional circumstances make such acquisitions in the public interest.

Fifth, franchising authorities should continue to have the discretion to determine whether additional franchises, including those operated by telcos, should be awarded.

Sixth, if a telco is permitted to provide more than simply "video dial tone" service, it should furnish access to multichannel video programming distributors and cable programmers on a nondiscriminatory basis.

Seventh, telcos should be regulated by cable franchising authorities that have responsibility for regulating other cable systems, and not by state public utility commissions.

• Damages immunity: Because of the increasing number of lawsuits challenging the right of local authorities to regulate cable systems, legislation also should include a damages immunity provision. Such a measure should provide immunity from monetary awards in federal, state or local lawsuits challenging regulatory activity by local officials. Both H.R. 550 and H.R. 506, introduced by Rep. Charles E. Schumer (D-N.Y.), contain immunity language acceptable to local governments.

• Exclusive programming: H.R. 1303 does contain several provisions that would help deter discrimination in the cable programming industry. However, Congress should be clear in its statement to the industry that any exclusive programming contracts will not be allowed. These contracts are the cornerstone of a closed industry, in which multichannel video programmers attempt to compete but are handicapped because they claim they cannot get access to the popular programming necessary for them to be competitive. The subcommittee should eliminate the measure in H.R. 1303 that grandfathers existing exclusive contracts, and it should amend language that sanctions these contracts so long as they do not "significantly impede" competition.

• <u>Must carry</u>: Local governments generally support the must carry provisions in H.R. 1303. They believe reinstitution of a must carry regime is necessary to help protect the future viability of free over-the-air broadcast television. However, a necessary amendment should alter the must carry section that allows cable operators to carry noncommercial broadcast stations on unused public, educational and governmental ("PEG") access channels, subject to franchising authority approval. Local governments suggest that the carriage of noncommercial stations on PEG channels be subject to a termination date and to a requirement that cable operators make efforts to transfer noncommercial stations to other channels when they become available.

• <u>Customer Service and Signal Quality Standards</u>: In both of these areas, local governments support institution of minimum standards by the FCC. However, local franchising authorities should have the right to establish unilaterally more stringent standards that better serve localized subscriber needs and expectations.

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FROM: Brad Risinger

COMMENTS: Attached is a draft submission for the record concerning H.R. 1303. It would be most helpful if I could get your edits by the close of business Tuesday. My direct number is (202) 728-6352. Thanks.

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